IN THE SUPREME COURT OF THE UNITED STATES

October Term 1975

No_____

THOMAS E. KEYSER, INDIVIDUALLY and Doing Business As KEYSER TOWING COMPANY,
Petitioner,

vs.

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

OSCAR SHEPARD, INDIVIDUALLY, AND HOLLENBECK TOW SERVICE, a Corporation,
Petitioner,

vs.

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

G. G. BAUMEN
1950 Sunset Boulevard
Los Angeles, California 90026
(213) 484 9161

Attorney for Petitioners

TOPICAL INDEX

	Page
Table of Authorities	iv
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	3
STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	7
A. FACTS	7
B. PROCEEDINGS	9
ARGUMENT - REASONS FOR GRANTING THE WRIT	11

Page

1. IT IS NOT THE INTENT OR PURPOSE OF THE FAIR LABOR STANDARDS ACT THAT COVERAGE EXTEND TO EMPLOYEES OF STRICTLY LOCAL AUTOMOTIVE SERVICE GARAGES NOT ENGAGED IN ANY INTERSTATE ACTIVITY. 11

2. BY OCCASIONALLY SERVICING MOTORISTS ON THE INTERNAL ARTERIES OF TRAFFIC MOVEMENT WITHIN THE CITY OF LOS ANGELES SOME OF WHICH HAVE BEEN DESIGNATED FEDERAL HIGHWAYS, EMPLOYEES OF AUTOMOTIVE SERVICE GARAGES WERE NOT ENGAGED IN COMMERCE AMONG THE SEVERAL STATES. 13

3. IT IS NOT THE INTENT OR PURPOSE OF THE FAIR LABOR STANDARDS ACT THAT LOCAL AUTOMOTIVE SERVICE GARAGES, WHICH FULLY MEET THE REQUIREMENTS FOR A "RETAIL OR SERVICE EXEMPTION" SHOULD BE DENIED THE SAME BECAUSE THEY ARE ON A LOCAL APPROVED LIST OF POLICE GARAGES, RECEIVING REFERRED CALLS, FOR WHICH THEY RECEIVE NO

Page

COMPENSATION EXCEPT FROM THE CUSTOMER ACTUALLY SERVED. 17

CONCLUSION 23

APPENDIX A

APPENDIX B

APPENDIX C

TABLE OF AUTHORITIES

Cases	Page
Gray v. Swanney-McDonald, Inc., 436 F. 2d 652	10
Hodgson v. Brand Names, Inc. (C A Fla. 1971) 452 Fed. 384	18
Hodgson v. Centralized Services, Inc. (4th Cir. 1972) 457 F. 2d 824	18
Hodgson v. Crotty Bros. Dallas Inc. (5th Cir. 1971) 450 F. 2d 1268	19
Idaho Sheet Metal Works, Inc. v. Wirtz (1966) 383 U.S. 190, 86 S. Ct. 737	17
Kirschbaum v. Walling, 316 U.S. 517, 62 S. Ct. 1116	11
McLeod v. Threlkeld, 319 U.S. 491, 63 S. Ct. 1248	12
Mitchell v. H. B. Zachary Co., 362 U.S. 310, 80 S. Ct. 739	12
Mitchell v. Kentucky Finance Co., 359 U.S. 290, 79 S. Ct. 756	17

Page

Rachal v. Allen (1967 C A 5 Tex)
376 F. 2d 999 19

Shultz v. Adair's Cafeteria
(C A Okla 1969)
420 F. 2d 390 18

Smith v. Taylor (1967 Fla)
375 F. 2d 1000 19

Voyles v. Murray (N. D. Tex 1969)
297 F. Supp. 1288 20

Wallace v. Tenn. Airmotive Inc.
(1965 D. C. Tenn)
238 F. Supp. 338 19

Walling v. Jacksonville Paper Co. (1943)
317 U. S. 564; 63 S. Ct. 332 11

Wirtz v. Modern Builders(1961)
288 F. Supp. 338 19

Wirtz v. Modern Trashmoval
(4th Cir. 1963)
323 F. 2d 451 18

Statutes

26 C. F. R.
§§779. 318, 779. 319, 779. 320,
779. 327 20

	Page
28 U.S.C.	
§1254(1)	3
29 U.S.C.	
§201	2, 4
§203(b)	4
§207(a)(1)	6
§213(a)(2)	3, 4, 5, 9, 10
§217	5, 6, 9

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1975
No _____

THOMAS E. KEYSER, INDIVIDUALLY and Doing Business As KEYSER TOWING COMPANY,
Petitioner,

vs.

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Respondent,

OSCAR SHEPARD, INDIVIDUALLY, AND HOLLENBECK TOW SERVICE, a Corporation,
Petitioner,

vs.

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Thomas E. Keyser, individually and doing business as Keyser

Towing Company, and Oscar Shepard, individually and Hollenbeck Tow Service, a corporation (parties in two separate cases which were tried together and heard on appeal together) respectfully pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit, filed in these matters on November 25, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is set out in Appendix "A."

The opinion of the United States District Court, the trial court, and the judgment rendered by it are set forth in Appendix "B."

JURISDICTION

Jurisdiction of this court is invoked in an effort to obtain settlement of issues of coverage under the Fair Labor Standards Act (29 U.S.C.A. 201 et seq) and exemption from the same, of local automotive tow service garages (which are found in all major communities, nationwide).

(i) The judgment and decision of the Court of Appeals for the Ninth Circuit is dated November 25, 1974 and entered on the same date.

(ii) No petition for rehearing was filed.

(iii) This petition for writ of certiorari was filed within 90 days of the date of the decision of the Court of Appeals in this matter.

(iv) The statutory provision believed to confer on this court jurisdiction to review the judgment of the Court of Appeals in this matter is Title 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Are employees of local automotive tow service garages, serving the public in restricted areas within the city of Los Angeles, California a city (located some 200 miles from another state) criss-crossed with freeways, which are the basic internal means for travel of the public within that city - by occasionally servicing motorists on these city arteries, some of which are designated as Federal highways, engaged in "commerce" as defined in the Fair Labor Standards Act?

2. Do local automotive service garages, serving the every day needs of the motoring public [in the city of Los Angeles] which otherwise fully meet all of the requirements of the Fair Labor Standards Act for the "retail service exemption" (29 U.S.C. 213[a][2]) by being designated as "official police garages" within their restricted areas, for which they

receive no compensation other than from those customers actually *serviced, lack a "retail* concept" so as to exclude them from such exemption?

STATUTORY PROVISIONS INVOLVED

The following provisions of the Fair Labor Standards Act of 1938 as amended (29 U.S.C. 201 et seq).

29 U.S.C. 203(b)

"§203. Definitions
As used in this chapter -

* * *

"(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

29 U.S.C. 213(a)(2)

"§213. Exemptions

"(a) The provisions of section 206 (except subsection [d] in the case of paragraph [1] of this subsection) and section 207 of this title shall not apply with respect to -

* * *

"(2) any employee employed by any retail or service establishment (except an establishment or employee engaged in laundering, cleaning, or repairing clothing or fabrics or an establishment engaged in the operation of a hospital, institution, or school described in section 203[s][4] of this title), if more than 50 per centum of such establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, and such establishment is not an enterprise described in Section 203(s) of this title or such establishment has an annual dollar volume of sales which is less than $250,000 (exclusive of excise taxes at the retail level which are separately stated). A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry;"

29 U.S.C. 217

"§217. Injunction Proceedings

"The district courts, together with the United States District Court for the District of the Canal Zone, the

District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title)."

29 U.S.C. 207(a)(1)

"§207. Maximum hours

"(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

STATEMENT OF THE CASE

A. FACTS

Keyser operates an automotive roadside service garage -- providing service of starting cars, changing tires, providing gas, minor repairs and towing where required - in competition with other tow service garages, in the limited area of South Central Los Angeles, California (Clk K p. 21, line 30 - line 3, p. 22, p. 125, lines 21, 22, 31 - line 1 p. 126; p. 126, lines 19-21; p. 179, lines 1-30).

Shepard (Hollenbeck Automotive, a corporation) operates an automotive roadside service garage, providing the same services as Keyser (including parking and storage of cars) in competition with other tow service garages, in the limited area of East Central part of Los Angeles, California (commonly known as the Hollenbeck area) (RT S. p. 201, lines 22-30).

Neither firm are engaged in transporting or transmitting any thing between California and any place outside of the State, all of their business being transacted in the areas of the City of Los Angeles listed above (Cl. T K p. 179, lines 31-32; S p. 202, lines 19-22; Clk T. K p. 181, lines 17-21, S p. 202, lines 26-32).

Neither firm service, maintain, repair or improve any instrumentality of commerce, nor do they service - nor have any contract to

service - any interstate carrier or company or equipment engaged in interstate commerce (C T K p. 180, lines 9-10, S. 202, lines 1-5).

No roadway designated as an interstate highway passes through the area of the city serviced by Keyser (Clk T K p. 126, lines 12-13, 19-21; pp. 130-132, p. 180, lines 1-5).

There are portions of freeways which are now designated as interstate highways passing through the area of the City of Los Angeles serviced by Shepard, but these are basic internal transportation routes for local residents moving from one section of the city to another (C. T. S 202, lines 6-9).

Both of these garages have been designated as Official Police Garages by the City of Los Angeles, to serve at the pleasure of the Police Commission -- without contract or agreement -- for which they receive no compensation from the City, having to look solely to the individual motorist referred to them for payment for services rendered to or on behalf of such motorists (C. T. K p. 27, lines 14-23; S. p. 26, lines 22-28; p. 27).

The service vehicles (tow trucks) of each of these garages have to comply with the same requirements under California law applicable to every tow truck on any street or highway in the state (Clk. T. K p. 154).

Each of these firms had a gross income from service sales of less than $250,000

annually, more than 75% of which was not for resale (in fact none of their services were for resale) and both firms business were recognized as retail sales in their industry (R. T. K p. 181, lines 17-21; S p. 202, lines 26-32; R. T. K p. 53, lines 7-2, p. 55; R. T. S p. 20, line 21, lines 1-3; p. 23, lines 1-6; R. T. Oct p. 58, lines 12-16; p. 60; Opn Cl Tr p. 222, lines 19-22).

B. PROCEEDINGS

The Department of Labor brought actions under Section 217 of Title 29, U. S. C. against each of these petitioners to restrain claimed withholding of what the Department computed was unpaid overtime compensation claimed due to two employees of Keyser and a number of employees of Shepard (as the Department did not approve the methods of computation of regular and overtime as to Shepart) (Cl Tr K pp. 1-4; S pp. 1-4).

Petitioners in defense of the actions asserted that none of their employees were engaged in commerce and thus not subject to the Fair Labor Standards Act; that the two employees of Keyser were exempt executives, being the day and night managers, respectively; that they had paid overtime excess of that required by the Act, and that in any event they were exempt as retail or service establishments under 29 U. S. C. 13(a)(2) of the Act (Cl Tr K pp. 5-8; S pp. 5-10).

The court concluded, based upon the decision in the Ninth Circuit, Gray v. Swanney-McDonald, Inc., 436 F. 2d 652 -- holding that such tow service garages (not just their employees) which rendered service to motorists in the city of Los Angeles on roadways that had been designated interstate highways were engaged in commerce between the states -- that each of the service garages were engaged in commerce under the Act, but found that each was exempt from coverage as a "retail or service establishment under 29 U. S. C. 213(a)(2) and rendered judgment dismissing both actions (Clk T K pp. 134-190; S pp. 200-211; pp. 213, 218-258, Op, pp. 260-264, 265, 277, 290-291; K pp. 195-233).

The Department of Labor appealed the judgment in each case, and petitioners, each cross appealed from that part of the judgment determined that they were engaged in interstate commerce (Cl Tr K pp. 230, 232-233; S pp. 277, 290-291).

The Court of Appeals, by its decision affirmed the judgment of the trial court determining that the petitioners were each engaged in interstate commerce and reversed the trial court on its determination that the petitioners were retail or service establishments, exempt from coverage under the Fair Labor Standards Act, holding that each lacked "retail concept" because a large part of their business was referred to them through the police department by reason of their being designated Official

Police Garages in the City of Los Angeles, and remanded the cases to the trial court for further proceedings (See Appendix A).

ARGUMENT - REASONS FOR GRANTING THE WRIT

1. IT IS NOT THE INTENT OR PURPOSE OF THE FAIR LABOR STANDARDS ACT THAT COVERAGE EXTEND TO EMPLOYEES OF STRICTLY LOCAL AUTOMOTIVE SERVICE GARAGES NOT ENGAGED IN ANY INTERSTATE ACTIVITY.

This court in the case of Walling v. Jacksonville Paper Company, 317 U.S. 564, 63 S.Ct. 332 (1943) pointed out that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states, and that coverage did not extend to them.

It further pointed out in that case that Congress in enacting the Fair Labor Standards Act, did not exercise the full scope of the commerce power; and, that the Act does not extend to businesses or transactions "affecting commerce" as this was rejected by Congress for the definition contained in the Act (citing the case of Kirschbaum v. Walling, 316 U.S. 517, 522; 62 S.Ct. 1116, 1119, 20).

As pointed out in the Kirschbaum case, supra, the original bill that passed the House applied to employers "engaged in commerce in

any industry affecting commerce;" but the bill recommended by the coference and as enacted applied only to employees "engaged in commerce or in the production of goods for commerce."

Again in the case of McLeod v. Threlkeld, 319 U.S. 491, 63 S.Ct. 1248, this Court reiterated such conclusion.

In the case of Mitchell v. H. B. Zachary Company, 362 U.S. 310, p. 316, 80 S.Ct. 739, p. 743, this court clearly pointed out:

> ". . . the Act also manifests the competing concern of Congress to avoid undue displacement of state regulation of activities of a dominantly local character. Accommodation of these interest was sought by the device of confinement of coverage to employment in activities of traditionally national concern. The focus of coverage became "commerce," not in the broadest constitutional sense, but in the limited sense of §3(b) of the statute: "trade, commerce, transportation, transmission, or communication among the several states ***"

Here - as with thousands of similar local automobile service garages across the land - the activity is strictly local. In this case such activity is confined not even to intrastate, but more restrictively to a very small sector,

as to each service garage, within the city of Los Angeles.

No employee crosses any state line, processes or services anything moving in commerce, nor maintains or services any instrumentality of commerce.

2. BY OCCASIONALLY SERVICING MOTORISTS ON THE INTERNAL ARTERIES OF TRAFFIC MOVEMENT WITHIN THE CITY OF LOS ANGELES SOME OF WHICH HAVE BEEN DESIGNATED FEDERAL HIGHWAYS, EMPLOYEES OF AUTOMOTIVE SERVICE GARAGES WERE NOT ENGAGED IN COMMERCE AMONG THE SEVERAL STATES.

Los Angeles is a city located some 200 miles distant from the nearest other state line. It is a city of freeways. These are the arteries of movement and lifeblood of this motorized city, and its environs (See map of freeways, Appendix "C," Copied from page 132, Clk Tr K submitted by Labor Dept.).

Los Angeles has no subways, no street cars, no elevated railways, no interurban trains, yet some five million people live in its metropolitan area and environs and daily travel to and from their places of residence to and from work. Their movement is by freeways.

as to each service garage, within the city of Los Angeles.

No employee crosses any state line, processes or services anything moving in commerce, nor maintains or services any instrumentality of commerce.

2. BY OCCASIONALLY SERVICING MOTORISTS ON THE INTERNAL ARTERIES OF TRAFFIC MOVEMENT WITHIN THE CITY OF LOS ANGELES SOME OF WHICH HAVE BEEN DESIGNATED FEDERAL HIGHWAYS, EMPLOYEES OF AUTOMOTIVE SERVICE GARAGES WERE NOT ENGAGED IN COMMERCE AMONG THE SEVERAL STATES.

Los Angeles is a city located some 200 miles distant from the nearest other state line. It is a city of freeways. These are the arteries of movement and lifeblood of this motorized city, and its environs (See map of freeways, Appendix "C," Copied from page 122, Ch. Tr. R submitted by Labor Dept.).

Los Angeles has no subways, no street cars, no elevated railways, no interurban trains, yet some five million people live in its metropolitan area and environs and daily travel to and from their places of residence to and from work. Their movement is by freeways.

Its bus system, termed Rapid Transit Authority, moves on these freeways. On one of its heaviest traveled routs, a 68 mile circle termed the "beltway" comprising the Santa Monica freeway from its downtown junction with the Harbor freeway, to the San Diego freeway in West Los Angeles, to junction with the Harbor freeway in South Los Angeles, and then the Harbor freeway north back downtown to its junction with the Santa Monica freeway, has along the route on the Santa Monica freeway large electronic signs every mile which tell the local motorists the condition of the traffic moving ahead, so they may judge their time of travel home or to work.

The local radio and T V stations have news helicopters overhead during the morning and afternoon to broadcast to local motorist going and coming from work the condition of the traffic on the freeways. And, the morning and afternoon newscasts tell the motorists the estimated time it takes to move from one location on certain freeways to another as the traffic conditions change, thereby accomodating them in judging their travel time to work or home from work.

Some of the branches of the Municipal Courts of the Los Angeles Judicial District are twenty miles apart (viz, downtown, San Pedro, West Los Angeles, Van Nuys) and the mode of travel to and from these is by freeways.

The Superior Courts of Los Angeles County, in the Los Angeles Metropolitan area, are even more widespread some of which are

almost fifty miles apart (viz East Branch, Pomona; South Branch, Long Beach; Southeast Branch, Norwalk; North Central Branch, Burbank and Glendale; Southwest Branch, Torrance; Northeast Branch, Pasadena; West Branch, Santa Monica; Central - downtown Los Angeles) yet they are closely linked because of the freeways. Business may be handled in several of these courts in a day, as the freeways are designed to move the local residents to these branch civic areas rapidly.

Persons incarcerated in the Los Angeles County Central jail can and are moved promptly to the various branch courts (and those in the downtown city jail to the various Municipal courts) without delay on the freeways.

These freeways afford to all in this motorized widespread metropolitan area, the only rapid transit system adaptable and designed to meet the unique needs of such community. They are as local and as basic to local use as its parks and public buildings. Many of its citizens who have never been out of the city in years daily traverse its freeways to and from work.

Merely because some of these local internal arteries have now been labeled as interstate highways does not place the population of this city in interstate commerce. Likewise when a local automotive garage serviceman responds to the call of a motorist to change a tire, supply him with gas, or start his car that has stopped on his way to

work on one of these basic routes of internal transportation, this does not place that serviceman or his employer in commerce among the States.

To indulge in the fiction that by occasionally servicing the needs of motorists on these primary internal transportation routes, employees of automotive service garages are engaged in commerce among the States, flies in the face of reason and defeats the intent and purpose of the Congress -- as has been interpreted by this court -- in enacting the Fair Labor Standards Act that its commerce coverage be restricted so that local businesses are excluded as well as those which merely "affect commerce."

3. IT IS NOT THE INTENT OR PURPOSE OF THE FAIR LABOR STANDARDS ACT THAT LOCAL AUTOMOTIVE SERVICE GARAGES, WHICH FULLY MEET THE REQUIREMENTS FOR A "RETAIL OR SERVICE EXEMPTION" SHOULD BE DENIED THE SAME BECAUSE THEY ARE ON A LOCAL APPROVED LIST OF POLICE GARAGES, RECEIVING REFERRED CALLS, FOR WHICH THEY RECEIVE NO COMPENSATION EXCEPT FROM THE CUSTOMER ACTUALLY SERVED.

Following some of the criteria given by this court in the case of Idaho Sheet Metal Works Inc. v. Wirtz, 383 U.S. 190, 86 S. Ct. 737 (1966) and that of Mitchell v. Kentucky Finance Company, 359 U.S. 290, 79 S. Ct. 756, the Federal Courts in several circuits have laid down guidelines - as has the Labor Department Administrator by regulations - for meeting the requirements of the "retail or service exemption" in the Fair Labor Standards Act.

These are in addition to the requirements spelled out in the statute itself (viz, more than 50% of business is done within the state, an annual dollar volume of service or sales of less than $250,000, 75% of which are not for resale, which sales or services are recognized as retail in the particular industry). They are intended to convey what is a "retail concept."

"Availability to the public" has been held to be a criteria for the "retail concept."

Hodgson v. Brand Names, Inc. (C A Fla 1971)
452 Fed. 384.

"to sell in small quantities" is another criteria.

Shultz v. Adair's Cafeteria (C A Okla 1969)
420 F. 2d 390.

Employees of a local business offering services to the "ultimate" consumers (drivers of a trash collection and garbage disposal company) were held to be within the "retail service concept."

Wirtz v. Modern Trashmoval (4th Cir. 1963)
323 F. 2d 451.

The business of preparing income tax returns for the general public in a limited geographical area was held to be with the "retail concept."

Hodgson v. Centralized Services, Inc. (4th Cir 1972)
457 F. 2d 824.

Truck drivers employed by a local building material store were within the retail concept.

Wirtz v. Modern Builders (1961)
288 F. Supp. 338.

The sale and servicing of aircraft at an airport was held to have a retail concept.

Wallace v. Tenn. Airmotive Inc. (1965 D. C. Tenn)
238 F. Supp. 338;

Rachal v. Allen (1967 C A 5, Tex)
376 F. 2d 999.

Services of funeral parlors are within the retail concept.

Smith v. Taylor (1967 Fla)
375 F. 2d 1000.

And even where goods and services rendered to the ultimate consumer are paid for by a third party, this does not destroy the retail category.

Hodgson v. Crotty Bros. Dallas Inc. (5th Cir. 1971)
450 F. 2d 1268.

And, lastly, a business identical to that of these petitioners, automotive service garage receiving a substantial number of their service calls through City and State enforcement

agencies - with the ultimate consumer, the motorist serviced, being the only source of compensation - was held to have a retail concept and entitled to the retail or service exemption under the Act.

Voyles v. Murray (N. D. Tex 1969) 297 F. Supp. 1288.

The regulations of the Administrator of Wages and Hours likewise shed light on the matter of retail concept. These are found in 26 C. F. R. 779, 318, 319, 320 and 327.

Section 779. 318 states:

"Typically a retail or service establishment is one which sells goods or services to the general public . . ." * * *

". . . It serves the everyday needs of the community in which it is located. . ."

". . . It provides the general public its repair services and other services for the comfort and convenience of such public in the course of its daily living. . . ."

Section 779. 320 gives a partial list of establishments whose sales or services may be recognized as retail which include: "Automobile repair shops," "Public parking lots," and "Public garages." The petitioners

agencies - with the ultimate consumer, the motorist serviced, being the only source of compensation - was held to have a retail concept and entitled to the retail or service exemption under the Act.

Voyles v. Murray (N. D. Tex 1965) 251 F. Supp. ____.

The regulations of the Administrator of Wages and Hours likewise shed light on the matter of retail concept. These are found in 26 C.F.R. 779, 318, 319, 320 and 327.

Section 779.318 states:

"Typically a retail or service establishment is one which sells goods or services to the general public. . . .

". . . It serves the everyday needs of the community in which it is located. . . .

". . . It provides the general public its repair services and other services for the comfort and convenience of such public in the course of its daily living. . . .

Section 779.320 gives a partial list of establishments whose sales or services may be recognized as retail which include: "Automobile repair shops," "Public parking lots," and "Public garages." The petitioners

are within the latter two catagories and do minor roadside automotive repairs within the first category.

It is respectfully submitted that petitioners herein meet all of the criteria set forth in the above cases and regulation as to a "retail concept."

They offer their services to the consuming public at all times. They serve the every day needs of the community where they are located. They provide to the general public repair and automotive roadside services for the comfort and convenience of such public in the course of its daily living. They service in small quantities, single vehicles one at a time. They are paid only by the customer served. None of their services are for resale.

However, the Court of Appeals concludes that because each on the list of approved or designated Official Police garages -- for which they receive no compensation and are subject to removal at the pleasure of the Los Angeles Police Commission at any time - they lack a "retail concept."

The court seems to push aside the fact that they are in competition with other tow service garages in the area, and that their sole source of compensation is from those customers they actually service.

The fact that a call may be referred to them through the police department (or the Highway Patrol) is no assurance that they will obtain that business, because if a competitor arrives before they do -- and often do -- the competitor takes the customer and the petitioners servicemen simply have made a fruitless trip.

Companies should not be punished for excellence of service. The effect of this decision -- and it affects a substantial number of the small local service garages across this country that are on preferred lists for local police calls -- is to deny firms that meet the requirements of the retail or service exemption, its benefit because their excellence of service commends them to referrals from local law enforcement agencies encountering disabled motorists on their streets.

It is not urged by the Labor Department that they are not open at all times to the public and service any call made to them. The claim is that because they get a large part of their business through referrals from local law enforcement agencies this takes away their retail concept...although nothing else has changed.

Clearly this thinking is out of step with the intent and purpose of the Act in setting out the requirements for exemption. Its purpose obviously was to relieve small businesses of the onerous bureaucratic bookkeeping system which the Federal agency imposes. (There is no issue here of minimum pay, for these

workers are among the highest paid in the industry, being specialists in their field utilizing expensive equipment).

CONCLUSION

For the reasons set forth in this petition, petitioners pray that a writ of certiorari issue to review the decision of the Ninth Circuit Court of Appeals in this matter.

Respectfully submitted,

G. G. BAUMEN

Attorney for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, *Appellant and Cross-Appellee,* vs. THOMAS E. KEYSER, INDIVIDUALLY, and D/B/A KEYSER TOWING COMPANY, *Appellee and Cross-Appellant,* and	Nos. 72-2887 & 72-2960 OPINION
OSCAR SHEPARD, INDIVIDUALLY, and HOLLENBECK TOW SERVICE, A CORPORATION, *Appellees and Cross-Appellants.*	Nos. 72-2888 & 72-2961

[November 25, 1974]

Appeal from the United States District Court
For the Central District of California

Before: CHAMBERS and CHOY, Circuit Judges, and McNICHOLS*, District Judge.

CHOY, Circuit Judge:

The Secretary of Labor brought these actions to enforce the overtime pay provisions of Section 7, Fair Labor Standards Act, 29 U.S.C. § 207. The defendant companies (Keyser and Shepard) operate automobile towing services in the Los Angeles area. The district court dismissed both actions, concluding that although Keyser and Shepard were engaged in interstate commerce and therefore were within the court's jurisdiction under the Act, they were exempt from its overtime regulations. During

*Honorable Ray McNichols, United States District Judge for the District of Idaho, sitting by designation.

APPENDIX A

the years in question, the court found, the companies had met the requirements of the retail sales and services exemption, 29 U.S.C. § 213(a)(2). The Secretary appeals from the dismissal, and Keyser and Shepard appeal from the district court's finding that they are engaged in interstate commerce.

Factual Background

The Los Angeles Police Department has designated both towing companies as "Official Police Garages" (OPG) and official impound stations for prescribed geographic areas of the city. No contractual relationship has ever existed between the Police Department and an OPG. The Department prescribes rules which an OPG must adhere to, however, if it is to retain its OPG designation. The OPG must observe a schedule of maximum rates for towing and storage services performed as a result of police activity, for example. Tow trucks must be of a certain color and bear OPG insignia, and must carry prescribed equipment. Tow truck drivers must wear standard uniforms. Regulations set minimum standards for storage lots, protection and handling of vehicles, and the safeguarding of property inside the vehicles. Each OPG is limited to a prescribed geographic area of operations, within which it has a monopoly on police referrals. An OPG not only benefits from handling police impoundments; when a citizen asks the police for a tow or roadside assistance without specifying a preferred towing company, the police will call the OPG assigned to that area.

A training bulletin of the Los Angeles Police states that an OPG is an agent of the Police Department. Tow truck drivers are commissioned Special Officers and are required to report observed criminal activity without delay. Although an OPG is not restricted to police calls and does accept calls directly from individuals needing assistance, the parties stipulated that "almost all" of Keyser's calls were police requests. Substantially more than half of Shepard's calls appear to have been from the police.

The towing companies received no compensation from the police for vehicles impounded and stored. The owner of the vehicles paid the towing and storage charges directly to the towing company, the vehicle then being released from impound-

ment. Unclaimed vehicles were sold to satisfy the serviceman's lien which attached to them.

Portions of two Interstate Highways (I-5 and I-10) pass through Shepard's area of operation. No Interstate Highway passes through Keyser's area, but seven percent of his calls are on a portion of the Harbor Freeway which connects the Long Beach area and I-405 to the south with I-5 and I-10 to the north.

Fair Labor Standards Act

Congress, in enacting the Fair Labor Standards Act, established certain standards for payment of overtime compensation by employers of workers engaged in interstate commerce. 29 U.S.C. § 207. It exempted, however, retail or service establishments meeting certain requirements. 29 U.S.C. § 213(a)(2). A "retail or service establishment" is defined as an establishment at least 75 percent of whose "annual dollar volume of sales" is not for resale and is recognized as retail "in the particular industry". Such a retail or service establishment is exempt from the Act's standards if its "annual dollar volume of sales" is less than $250,000, and at least 50 percent of which are in the state where the establishment is located.[1]

Interstate Character of the Services

In their cross-appeal, the towing companies contend that their services are local in character, with no substantial impact on interstate commerce. In *Gray v. Swanney-McDonald, Inc.*, 436 F.2d 652 (9th Cir.) *cert. denied*, 402 U.S. 995 (1971), we held that tow truck drivers doing a portion of their work on Interstate or

[1]Fair Labor Standards Act § 13(a)(2), 28 U.S.C. § 213(a)(2):

(a) The provisions of . . . [Section 7] shall not apply with respect to—

(2) any employee employed by any retail or service establishment . . . if more than 50 per centum of such establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located . . . [if] such establishment has an annual dollar volume of sales which is less than $250,000 (exclusive of excise taxes at the retail level which are separately stated). A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry;

U.S. Highways were engaged in interstate commerce, and therefore were within the coverage of the Act. We remain convinced of the soundness of that decision. We observed in *Swanney-McDonald* that although the contact of any one company with interstate traffic might be small, the cumulative impact of the entire towing industry was substantial. To exempt Keyser from the Act's regulation because the Harbor Freeway is a state highway, but require Shepard's compliance because the Santa Ana Freeway has been designated an Interstate Highway, would be to miss the point of *Swanney-McDonald*. We were less concerned in that case with the formal designation of a highway than with the reality of its utility to interstate commerce. The towing companies' concern that this test leaves no room for purely local commerce would be better argued in another case: here, we rely on the trial judge's knowledge of local conditions in finding that the Harbor Freeway is so interconnected with the area's interstate highways as to be an instrumentality of interstate commerce.

Retail Nature of the Services

In arguing that Keyser and Shepard do not fall within the retail sales or service exemption, 29 U.S.C. § 213(a)(2), the Secretary contends that they have not met their burden of showing that 75 percent of their services were recognized as retail "in the particular industry". One witness, the president of the Official Police Garage Association, testified that towing was recognized as retail by the auto tow service industry.

The district court found that all of the companies' sales and services were recognized as retail in the industry. The Secretary argues that recognition *by* the industry is not synonymous with recognition *in* the industry. We agree, but we observe that evidence proving the first also tends to prove the second. The companies were required to show recognition in the industry in order to claim the exemption. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 393 (1960). We cannot say, however, that the testimony offered that towing services are recognized as retail by the industry was not substantial evidence that they are so recognized in the industry, nor that the trial judge's finding was clearly erroneous.

Mitchell v. City Ice Co., 273 F.2d 560 (5th Cir. 1960), cited as authority by the Secretary, actually supports the companies' position. In *City Ice*, the Fifth Circuit held that uncontested testimony showing recognition *by* the industry did not entitle the defendants to a directed verdict on the issue of recognition *in* the industry; instead it remanded the case for a jury trial on the issue, "The weight to be given [the industry witnesses'] opinions was, of course, to be weighed in light of their self-interest as well as the reasoning with which they supported them. It was not proper for the trial court to take the case from the jury." *Id.* at 562. Similarly, we rely on the findings of the trier of fact in this instance.

Although we accept the findings of the district court that the companies met the statutory requirements of the retail sales or service exemption, we find another barrier to their inclusion within that exemption. The rather broad statutory definition of a "retail or service establishment" has been narrowed by judicial decision. Not only must the particular sales or services in question be recognized as retail in the industry, but the industry itself must be one which Congress contemplated as falling within the "retail concept". *Wirtz v. Idaho Sheet Metal Works, Inc.*, 335 F.2d 952, 956 (9th Cir., 1964), *aff'd*, 383 U.S. 190 (1966). Unlike the district court's finding that the services were recognized as retail in the industry, the question whether the industry itself falls within the retail concept of the Act is one of law—of statutory interpretation.

Congress granted the Secretary a large measure of discretion in administering the Act. *Idaho Metal Works*, 383 U.S. at 205. The Secretary has utilized his expertise in compiling lists of industries whose sales possess or lack a retail character. 29 C.F.R. §§ 779.317 and 779.320. The automobile towing industry is on neither list. Opposing counsel expend considerable ingenuity drawing analogies between the towing industry and businesses found on one list or the other. The Secretary urges that towing companies perform the same function as ambulance companies and thus are part of the transportation industry which possess no retail character; the companies counter that they more closely resemble auto repair shops and service stations, whose services are recognized as retail.

The district court found the companies' position more persuasive. We prefer, however, to go behind these analogies and root our decision in the congressional purpose in enacting the retail exemption. The legislative history contains repeated expressions of concern for "the grocery store, the hardware store, the coal dealer, the automobile dealer selling passenger cars or trucks, the clothing store, the dry goods store, the department store, the paint store . . . ." *Idaho Metal Works*, 383 U.S. at 203, *quoting* House Conf. Rep. at 25. *See A. H. Phillips, Inc., v. Walling*, 324 U.S. 490, 497 n. 7 (1945). Most of these retailers deal in consumer goods, although sales of farm implements and small trucks also fall within the retail concept. *Idaho Metal Works*, 383 U.S. at 203. The nature of the merchandise seems less important than the nature of the merchant. Adoption of the retail exemption was an effort to balance the needs of the small town or neighborhood merchant against the welfare of employees. The frequent allusions in the legislative history to the "corner grocer" suggests a desire by many Congressmen to shield from rigid regulation the informal business methods and record keeping of Main Street businessmen who, in dealing directly with the consumer, need a greater flexibility in hours, wages, and conditions of employment than do those businesses dealing principally with other commercial establishments.

We venture no opinion regarding the retail nature of independent towing services. For the purposes of the retail exemption, however, towing services which derive a large proportion of their business from police calls are a distinct activity from those whose assistance is requested directly by the automobile owner. The close relationship between proprietor and customer which characterizes the "Main Street" businessman is absent. Keyser and Shepard emphasize that they have no formal contract with the police. This argument overlooks the symbiosis between police and towing company. In exchange for a monopoly of police calls in a specified area, the companies consent to a large measure of police regulation, even of such details as color of the trucks, uniforms of the drivers, prices charged, and equipment used.

The parties stipulated that almost all of Keyser's business and most of Shepard's was derived from police calls. An OPG

manager signed a statement that "I understand that my designation as an Official Police Garage may be revoked upon proper finding of the Board that I or any of my employees have violated the rules herein agreed". The police training bulletin thus seems fully justified in asserting that: "Official Police Garages are a group of towing operations providing service to both the citizens and the Department and, as such, act as agents of the Department". The companies' actual customer is the government. The vehicle owner's sole relationship to the towing company in the typical case is to pay the fee established by the Board of Police Commissioners in order to free his vehicle from impoundment. He is apt to view the towing company as quasi-governmental in nature. In both appearance and reality, these companies work hand in hand with the municipality in performing a service to the general public, often to the annoyance of the "customer" whose car has been impounded. Despite the absence of a formal contract, the companies have sold a major portion of their services to the city in exchange for a limited monopoly of the city's business.

Exceptions to humanitarian and remedial legislation must be narrowly construed. Only those businesses clearly within both the terms and spirit of the exemption should be allowed to benefit from it. *A. H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). The towing companies have failed to convince us that Congress intended a business of this nature to be exempted from the Act's regulations as a retail establishment.

The finding of the district court that the towing companies engaged in interstate commerce and thus fell within the jurisdiction of the Act is affirmed. Its holding that the retail sales and service exemption applies to Keyser and Shepard, and its dismissal of the Secretary's complaint, are reversed. The case is remanded to the district court for a determination whether the overtime pay provisions of the Act were in fact violated.

Affirmed In Part; Reversed In Part and Remanded.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 12-5-74—400

APPENDIX B

FILED
APR 14 1972

CLERK, U.S. DISTRICT COURT
Central District of California
By /s/_____Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMES D. HODGSON, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,	)	OPINION
	)	April 12, 1972
Plaintiff,	)	Civil Action No. 70-659-TC
THOMAS E. KEYSER, individually and doing business as KEYSER AUTO SERVICE, and KEYSER'S AUTO SERVICE, a partnership,	)	
Defendants.	)	

APPENDIX B

JAMES D. HODGSON, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,	)	
Plaintiff,	)	
vs.	)	Civil Action No. 70-1386-TC
OSCAR SHEPARD, individually, and HOLLENBECK AUTOMOTIVE, a corporation,	)	
Defendants.	)	

John M. Orban, Associate Regional Solicitor,
Jeannie J. Meyer, Office of the Solicitor,
United States Department of Labor,
Room 7725 Federal Building,
300 North Los Angeles Street,
Los Angeles, California 90012.

Attorneys for Plaintiff.

G. G. Baumen,
1950 Sunset Boulevard,
Los Angeles, California 90026.

Attorney for Defendants.

SOLOMON, Judge:

The Secretary of Labor (Secretary) filed these two actions against defendants who operate towing and emergency road service companies in the City of Los Angeles. The Secretary seeks to compel the defendants to comply with the overtime provisions of the Fair Labor Standards Act of 1938, as amended, Title 29 U.S.C. §201 et seq. (the Act), and to obtain a judgment against them for overtime compensation due their employees.

Shepard's company, Hollenbeck Automotive, operates in the Hollenbeck precinct of Los Angeles, an area which includes portions of two major interstate highways (I-10 and I-5). His trucks and crews regularly provide service to disabled and wrecked vehicles on those highways. At the conclusion of the trial, I found that defendant Shepard was engaged in interstate commerce, and within the jurisdiction of the Act. Gray v. Swanney-McDonald, Inc., 436 F. 2d 652 (9th Cir. 1971) cert. denied, _____U.S.____(1971).

Keyser primarily conducts his operations in two precincts which border on California State Highway No. 11, the Harbor Freeway. Approximately seven per cent of his service calls are on this freeway. Although the Harbor Freeway is not within the National System of Interstate & Defense Highways, it joins directly with four important interstate highways: I-5, I-10, I-405, and U.S. 101. I find that the Harbor Freeway is so

interconnected with interstate traffic through and around Los Angeles, that it constitutes an instrumentality of interstate commerce for the purposes of the Act.

I now find that, even though a great portion of Keyser's business is done on state highways and Los Angeles city streets, Keyser's operations are within the jurisdiction of the Act because of the work which is done on the Harbor Freeway.

However, the Act does not cover all businesses engaged in interstate commerce. The defendants in each case contend that they are not required to pay overtime compensation for the reason that they are exempt as a "retail service establishment." Section 213(a)(2) of the Act states that the minimum wage and maximum hour provisions of the Act shall not apply to:

> "(2) any employee employed by any retail or service establishment (except an establishment or employee engaged in laundering, cleaning, or repairing clothing or fabrics or an establishment engaged in the operation of a hospital, institution, or school described in section 203[s][4] of this title), if more than 50 per centum of such establishment's annual dollar volume of sales or goods or services is made within the State in which the establishment is located, and

interconnected with interstate traffic through and around Los Angeles, that it constitutes an instrumentality of interstate commerce for the purposes of the Act.

I now find that, even though a great portion of Keyser's business is done on state highways and Los Angeles city streets, Keyser's operations are within the jurisdiction of the Act because of the work which is done on the Harbor Freeway.

However, the Act does not cover all businesses engaged in interstate commerce. The defendants in each case contend that they are not required to pay overtime compensation for the reason that they are exempt as a "retail service establishment." Section 213(a)(2) of the Act states that the minimum wage and maximum hour provisions of the Act shall not apply to:

such establishment is not in an enterprise described in section 203 (s) of this title or such establishment has an annual dollar volume of sales which is less than $250,000 (exclusive of excise taxes at the retail level which are separately stated). A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry."

The evidence here shows that the amount of business which the defendants do would qualify them for the retail service exemption if the exemption is available to the emergency roadside service and towing industry.

In order for defendants' services to be "recognized as retail sales or services in the particular industry," the emergency roadside service and towing industry must be one which has a "retail service concept." Idaho Sheet Metal Works v. Wirtz, 383 U.S. 190 (1966).

The interpretative bulletins of the Administrator of the Wage and Hour Division of the Department of Labor (Administrator) are entitled to great weight. Skidmore v. Swift & Co., 323 U.S. 134 (1944). The Administrator lists a number of industries which possess, or do not possess, a "retail concept." 29 C.F.R. §§79.316, 779.320.

Although emergency roadside service and towing appear on neither list, the Administrator includes similar and related industries among those which do possess the retail concept, e.g., auto repair shops, filling stations, public parking lots, and public garages. 29 C.F.R. 779.320.

In Voyles v. Murray, 297 F.Supp. 1288 (N.D. Tex. 1969), the Court held that a business which provided towing and wrecker service to individual vehicle owners was entitled to the retail service exemption because its customers were the general consuming public.

In Snelling v. O.K. Service Garage, Inc., 311 F.Supp. 842 (E.D. Ky. 1970), the Court held that a business which provided the same service, but which did more than 80 per cent of its work at the request of governmental agencies, was not entitled to the exemption.

The defendants' operations resemble those in Voyles, supra, rather than in Snelling, supra. Keyser is authorized to act as an "Official Police Garage" by the Los Angeles Police Department, but neither defendant is under contract to any governmental agency, nor receives funds from any such agency. All of the defendants" roadside and towing services are paid for by the individual vehicle owners, and any motorist in distress may call upon the defendants' services.

In Gray v. Swanney-McDonald, Inc., supra, the Court held that an emergency roadside service and towing company similar to defendants' would be eligible for the retail service exemption if it met the percentage and volume requirements of Section 213(a)(2). Although the Court's opinion does not directly address the issue of whether the tow truck industry possesses a retail concept, I believe that the Court's decision gives strength to the defendant's contentions.

I find that the defendants' operations have a retail service concept as required by the Act and that they are entitled to exemption under the retail service exemption of the Act.

This opinion shall serve as findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

Dated this 12th day of April, 1972.

/s/
United States District Judge

FILED
APR 14 1972
CLERK, U.S. DISTRICT COURT
Central District of California
By /s/ Deputy

ENTERED
APR 14 1972
CLERK, U.S. DISTRICT COURT
Central District of California
By /s/ Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMES D. HODGSON, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Plaintiff, vs. THOMAS E. KEYSER, individually and doing business as KEYSER AUTO SERVICE, and KEYSER'S AUTO SERVICE, a partnership, Defendants.	Civil Action No. 70-659-TC JUDGMENT

Based upon the findings of fact and conclusions of law in the opinion of the Court dated this day, plaintiff's action against defendants is dismissed with prejudice. No costs.

Dated this 12th day of April, 1972.

/s/_____
United States District Judge

APPENDIX C

APPENDIX C

No. 74-907

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1975

THOMAS E. KEYSER, INDIVIDUALLY and Doing Business As KEYSER TOWING COMPANY,
Petitioner,

vs.

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

OSCAR SHEPARD, INDIVIDUALLY, AND HOLLENBECK TOW SERVICE, a Corporation,
Petitioner,

vs.

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI CALLING ATTENTION TO NEW CASE

G. G. BAUMEN
1950 Sunset Boulevard
Los Angeles, California 90026
(213) 484 9161

Attorney for Petitioners

TOPICAL INDEX

	Page
NEW CASE BY THIS COURT BEARING DIRECTLY ON ISSUE IN PETITION FOR WRIT OF CERTIORARI	2

TABLE OF AUTHORITIES

Cases

Alstate Construction Co. v. Durkin, 345 U.S. 13, 73 S.Ct. 565, 97 L.Ed. 745	6
Gulf Oil Corporation, et al. v. Copp Paving Co., Inc., et al., ___ U.S. ___, 95 S.Ct. 392	2, 3, 4 5, 6, 7
Kirschbaum v. Walling, 316 U.S. 517, 62 S.Ct. 1116	5
McLeod v. Threlkeld, 319 U.S. 491, 53 S.Ct. 1218	6
Overstreet v. North Shore Corp., 318 U.S. 125, 63 S.Ct. 494, 87 L.Ed. 656	5, 6

Statutes

Revised Rules of the Supreme Court,
Subsection 5 of Rule 24 2

15 U.S.C. 12, 13, 13(a), and 14
Robinson-Patman and Clayton Acts 3
4, 6

29 U.S.C. Sec. 203(b)
Fair Labor Standards Act 3, 4
5, 6

Miscellaneous

H.R. 8442, 74th Congress,
2nd Session 1936 5

H.R. No. 2738, 75th Cong.,
3rd Session, pp. 29-30 5

83 Cong. Rec. 9158, 9266.67 5

No. 74-907

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term 1975

THOMAS E. KEYSER, INDIVIDUALLY and Doing Business As KEYSER TOWING COMPANY,

Petitioner,

vs.

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

OSCAR SHEPARD, INDIVIDUALLY, AND HOLLENBECK TOW SERVICE, a Corporation,

Petitioner,

vs.

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI CALLING ATTENTION TO NEW CASE

Petitioners, Thomas E. Keyser (individually and doing business as Keyser Towing Company, and Oscar Shepard, individually, and Hollenbeck Tow Service, a corporation (parties in two separate cases which were tried together and heard on appeal together) who have heretofore filed a petition for writ of certiorari in this matter, which petition is pending, pursuant to the provisions of Subsection 5 of Rule 24 of Revised Rules of the Supreme Court of the United States, file this supplemental brief to call to the Court's attention a new case not available at the time of the filing of the petition.

NEW CASE BY THIS COURT BEARING DIRECTLY ON ISSUE IN PETITION FOR WRIT OF CERTIORARI

Subsequent to the filing of the petition for writ of certiorari by petitioners herein, their counsel received Advance Sheets Booklet No. 6 of volume 95 of Supreme Court Reporter, dated January 15, 1975 containing the case of:

Gulf Oil Corporation, et al. v. Copp Paving Co., Inc., et al.,
(argued October 21, 22, 1974, decided December 17, 1974)

___ U.S. ___, 95 Supreme Court 392.

This case -- as is the petitioners' case herein -- was from the Court of Appeals for the Ninth Circuit.

There the Court of Appeals -- as it has done in this case -- held that a local activity involving no transaction concerning more than one state was "in commerce" as a matter of law.

Its decision involved a determination of whether local suppliers of interstate highway building materials were engaged "in commerce" under the Robinson-Patman and Clayton Acts (15 U.S.C. 12, 13, 13(a), and 14) which defines "commerce" substantially as it is defined under the Fair Labor Standards Act (29 U.S.C. Sec. 203(b)), the Act involved in the case of petitioners' herein.

This Court in the above case, Gulf Oil v. Copp Paving Co., supra, reversed the Court of Appeals for the Ninth Circuit, holding that such local activity of supplying building materials for the construction of interstate highways did not place such suppliers "within the flow of interstate commerce" as specified in the Robinson-Patman and Clayton Acts.

This ruling is significant here for the same Court of Appeals has determined that automotive roadside tow service drivers serving the needs of local motorists within restricted small areas inside the city of Los Angeles, one of which areas had passing through it local

freeways which were the internal transportation routes of the city but which were labelled interstate highways, were "in commerce" as defined by the Fair Labor Standards Act.

In the Robinson-Patman and Clayton Acts, involved in the Gulf Oil case, commerce is defined as:

> "'Commerce,' as used herein means trade or commerce among the several states and with foreign nations. . . ." 15 U.S.C. 12.

"Commerce" as defined in the Fair Labor Standards Act, involved in petitioners' case, is:

> "'Commerce,' means trade, commerce, transportation, transmission or communication among the several states or between any state or any place outside thereof." (29 U.S.C. 203 (b).

This Court has pointed out in the above case, Gulf Oil Corp. v. Copp Paving Co., Inc., that the language of the Clayton and the Robinson-Patman Acts was facially narrow, and that when the Patman bill was passed by the House it contained in addition to its present narrow language of Sec. 2(a) the following:

> "It shall be unlawful for any person, whether in commerce of not, either directly or indirectly to discriminate, etc." (H.R. 8442,

74th Congress, 2nd Session 1936.)

Whereas the Conference Committee deleted this "effects on commerce" provision, leaving only the "in commerce" language which is now contained in the Acts.

The same situation occurred as to the Fair Labor Standards Act, for as pointed out in Kirschbaum v. Walling, 316 U.S. 517, 522, 62 Supreme Court 1116, 1119, 1120, the original bill that passed the House applied to employers "engaged in commerce in any industry affecting commerce," but the bill recommended by the Conference and as enacted applied only to employees "engaged in commerce (or in the production of goods for commerce)" (H.R. No. 2738, 75th Cong., 3rd Session, pp. 29-30; 83 Cong. Rec. 9158, 9266.67). The "affecting" was eliminated.

In Gulf Oil Corporation v. Copp Paving Co., Inc., the Court does distinguish two situations under the Fair Labor Standards Act from the situation in such case.

The first was that involved in the Overstreet v. North Shore Corp., 318 U.S. 125, 63 S.Ct. 494, 87 L.Ed. 656 (1943). There, employees were engaged in maintaining a toll road and drawbridge between Fort George Island which is separated from the Coast of Florida by the intercoastal waterway.

The Court pointed out that the drawbridge affected interstate commerce on the intercoastal waterway and the drawbridge and the road were

the only means of access between Fort George Island and Florida and the other states and thus the employees were "engaged in commerce." (Yet, in the case of McLeod v. Threlkeld, 319 U.S. 491, 53 Supreme Court 1218, decided four months after the Overstreet case, the court held that a cook and caretaker for maintenance-of-way men on a railroad was not engaged "in commerce" pointing out that the proposal to have the act applied to industries "affecting" commerce was rejected in favor of the language now in the act.)

(Petitioners' employees do not maintain or service any instrumentalities of commerce.)

The second situation relating to the Fair Labor Standards Act mentioned in the Gulf Oil case by this Court was in the case of Alstate Construction Co. v. Durkin, 345 U.S. 13, 73 S.Ct. 565, 97 L.Ed. 745 (1953). There employees engaged in the manufacture of materials used for the construction of interstate highways were deemed to be engaged "in the production of goods for commerce," as provided in the Fair Labor Standards Act. This Court pointed out in the Gulf Oil case - and it applies here, too - that that situation is not applicable because the issue presented is "in commerce," (not production of goods for commerce).

Thus, in view of the fact that the definition of "in commerce" contained in the Robinson-Patman and Clayton Acts, and that contained in the Fair Labor Standards Act are substantially the same, that the legislative history as to each

of such acts indicates that the final language adopted for "in commerce" was far more restrictive than originally proposed and that - as in the situation in the Gulf Oil case - the acts of employees of Petitioners herein do not involve any transactions with more than one state (or maintain or service any instrumentality of commerce) the reasoning and determination of this Court in Gulf Oil Corp. v. Copp Paving Co., Inc., as to not being "in commerce" should apply to petitioners' employees herein.

Respectfully submitted,

G. G. BAUMEN

Attorney for Petitioners

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-907

THOMAS E. KEYSER, INDIVIDUALLY, AND D/B/A KEYSER TOWING COMPANY

AND

OSCAR SHEPARD, INDIVIDUALLY, AND HOLLENBECK TOW SERVICE, A CORPORATION, PETITIONERS

v.

PETER J. BRENNAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners contend that the court of appeals erroneously construed the Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*, to apply to their towing operations which, they assert, are local and "retail" in character.

The Secretary of Labor brought these actions to enforce the overtime pay provisions of Section 7 of the Act, 29 U.S.C. 207, alleging that several of petitioners' employees had been denied overtime payments. The district court dismissed both actions, concluding that although petitioners were engaged in interstate commerce and therefore covered by the Act, they came within the Act's "retail sales or services" establishments exemption from overtime regulations (Pet. App. B-1—B-9).

The court of appeals affirmed the district court's finding that petitioners were engaged in interstate commerce, but reversed its holding that petitioners came within the Act's "retail sales and service" exemption, since petitioners did most of their business with and through the Los Angeles Police Department rather than the public at large (Pet. App. A7). The court therefore remanded the case to the district court for a determination whether the overtime pay provisions of the Act were in fact violated.

1. The district court and the court of appeals correctly held that petitioners are engaged in interstate commerce within the coverage of the Act. As the district court found, petitioner Hollenbeck's trucks and crews regularly tow and impound or assist vehicles which have been disabled or wrecked on major interstate highways passing through Los Angeles; petitioner Keyser's trucks and crews do the same on the Harbor Freeway, which "is so interconnected with interstate traffic through and around Los Angeles, that it constitutes an instrumentality of interstate commerce for the purposes of the Act" (Pet. App. B-3—B-4).

Petitioners' activities in keeping the channels of interstate commerce clear of disabled or wrecked vehicles is "so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it,' " *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 130. Following *Overstreet*, where this Court applied the Act to employees of a company engaged in maintaining a drawbridge which, unless properly serviced, would obstruct interstate transportation, numerous lower courts have applied the Act to employees of towing and wrecker services (such as petitioners') which help "maintain the road free from obstruction." *Crook* v. *Bryant*, 265 F.2d 541, 543

(C.A. 4); *Gray* v. *Swanney-McDonald, Inc.*, 436 F.2d 652 (C.A. 9), certiorari denied, 402 U.S. 995.[1]

In their Supplemental Brief, petitioners rely on *Gulf Oil Corp.* v. *Copp Paving Co.*, No. 73-1012, decided December 17, 1974, in which the Court held that a local manufacturer of concrete for road construction was not engaged "in [interstate] commerce" within the meaning of the Robinson-Patman and Clayton Acts since his only nexus with interstate commerce was manufacturing materials used in constructing roads on which interstate traffic would thereafter move. But that activity has a far less direct connection with interstate commerce than removing disabled and abandoned vehicles and wrecks directly impeding or endangering interstate traffic. Moreover, the Court's holding in *Gulf Oil* was based on the particular "purposes and legislative history" of the Robinson-Patman and Clayton Acts (slip. op. at 10), which foreclosed an expansive reading of the term "in commerce" as used therein (*id.* at 11). The Court expressly distinguished the Fair Labor Standards Act, noting "we are concerned in this case with significantly different statutes" (*id.* at 10). In contrast to the Robinson-Patman Act, the Fair Labor Stand-

---

[1]See also *Snelling* v. *O.K. Service Garage, Inc.*, 311 F. Supp. 842 (E.D. Ky.); *Wirtz* v. *Robinson & Stephens, Inc.*, 20 WH Cases 765, 68 LC para. 32,708 (N.D. Ga.); *Hodgson* v. *Greenfield Auto Service*, 20 WH Cases 65, 65 LC para. 32,526 (W.D. Pa.).

The Act has been held applicable, on the same basis, to companies engaged in dredging navigable waters, *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F.2d 334 (C.A. 9); repairing, maintaining and lighting streets and runways at a military base, *Wirtz* v. *B.B. Saxon Co.*, 365 F.2d 457, 460, 462 (C.A. 5); *Wirtz* v. *R.E. Lee Electric Company*, 339 F.2d 686 (C.A. 4); and providing ambulance service for victims of automobile accidents occurring on interstate highways, *Duffy* v. *Oele*, 274 F. Supp. 307 (W.D. Mich.); *Wirtz* v. *A-1 Ambulance Service, Inc.*, 299 F. Supp. 197 (E.D. Ark.); *Kelly* v. *Ballard*, 298 F. Supp. 1301 (S.D. Calif.); *Barnes* v. *Silva*, 19 WH Cases 257, 61 LC para. 32,257 (N.D. Calif.); *Shultz* v. *Turley*, 19 WH Cases 239, 61 LC para. 32,253 (W.D. Ark.).

ards Act has been construed by this Court "to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce." *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 567; *Overstreet* v. *North Shore Corp.*, *supra*, 318 U.S. at 128.

2. The court of appeals correctly held that petitioners' business did not qualify for the "retail or service"[2] exemption provided in Section 13(a)(2) of the Act, 29 U.S.C. 213(a)(2).[3] The fact that petitioners transact business with the public is not dispositive since "not everything the consumer purchases can be a retail sale of goods or services." *Idaho Metal Works* v. *Wirtz*, 383 U.S. 190, 203; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 295. Rather, the term "retail or service establishment" in Section 13(a)(2) refers to establishments "comparable to the local merchant, corner grocer or filling station operator * * *," *Roland Co.* v. *Walling*, 326 U.S. 657, 666; *Phillips Co.* v. *Walling*, 324 U.S. 490, 497, who, in responding directly to consumers, "need a greater flexibility in hours, wages, and conditions of employment than do those businesses dealing principally with other commercial establishments" (Pet. App. A6).

---

[2]A "service" establishment "has the ordinary characteristics of a retail establishment except that it sells services instead of goods." *Fleming* v. *A.B. Kirschbaum Co.*, 124 F.2d 567, 572 (C.A. 3), affirmed *sub nom. Kirschbaum Co.* v. *Walling*, 316 U.S. 517.

[3]Section 13(a)(2) of the Act provides, in pertinent part, that

"(a) The provisions of * * * [Section 7] shall not apply with respect to—

* * * * *

(2) any employee employed by any retail or service establishment * * *. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry * * *."

As the court of appeals recognized, the great bulk of petitioners' services[4] are rendered at the request of the police. Petitioners serve as exclusive "Official Police Garages" and impounding stations in their designated areas (Pet. App. A2, A6-A7). Their work is performed under the supervision of the police department pursuant to departmental rules fixing rates and setting standards[5] adapted to police objectives, rather than to consumer needs (*ibid.*). Motorists normally do not request petitioners' services; indeed, they may not desire such services, particularly when their automobiles, found to have been obstructing traffic, are towed and impounded by petitioners. As the court of appeals stated, "[t]he vehicle owner's sole relationship to the towing company in the typical case is to pay the fee established by the Board of Police Commissioners in order to free his vehicle from impoundment" (Pet. App. A7). Thus, "[i]n both appearance and reality, these [petitioners] work hand in hand with the municipality in performing a service to the general public, often

---

[4]It was stipulated that "almost all" of petitioner Keyser's calls were police requests, and substantially more than half of petitioner Shepard's calls were from the police (Pet. App. A6—A7).

[5]Towing trucks must be of certain color and bear official police garage (OPG) insignia, and must carry prescribed equipment. Truck drivers must wear standard OPG uniforms. Regulations also set minimum standards for storage lots, protection and handling of vehicles, and the safeguarding of property inside the vehicles. Each OPG is limited to a prescribed geographic area of operations in which it has a monopoly on police referrals. A training bulletin of the Los Angeles police states that an OPG is an agent of the police department. And truck drivers are commissioned Special Officers in the police department, required to report any criminal activity they observe (Pet. App. A2).

to the annoyance of the 'customer' whose car has been impounded" (*ibid.*). The court of appeals therefore correctly concluded that "[t]he companies' actual customer is the government" (*ibid.*).[6]

Exemptions to the remedial provisions of the Act are to be narrowly construed and to be allowed only upon a showing that the employer is "plainly and unmistakably within [the] * * * terms and spirit" of the exemption he claims. *Phillips Co.* v. *Walling, supra*, 324 U.S. at 493; *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392. Here, petitioners failed to sustain this burden.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

WILLIAM J. KILBERG,
Solicitor of Labor,

CARIN ANN CLAUSS,
Associate Solicitor,

JACOB I. KARRO,
JOHN K. LIGHT,
Attorneys,
Department of Labor.

MARCH 1975.

---

[6]Although the district court found that petitioners' services were recognized as retail "in the industry," the court of appeals correctly noted that "the industry itself must be one which Congress contemplated as falling within the 'retail concept'. *Wirtz* v. *Idaho Sheet Metal Works, Inc.*, 335 F.2d 952, 956 (9th Cir., 1964), aff'd, 383 U.S. 190 (1966)" (Pet. App. A5). The court of appeals made no conclusion regarding the retail nature of the automobile towing industry, but recognized that "towing services which derive a large proportion of their business from police calls are a distinct activity from those whose assistance is requested directly by the automobile owner" (Pet. App. A6).